Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1901

In the Supreme Court of the United States

OCTOBER TERM, 1980

PETER ZUCCARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was authorized to set bail terms that were more stringent than those that had previously been set by a magistrate with respect to a person charged with an offense triable in the district court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12a-16a) is reported at 645 F.2d 104.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1981. The petition for a writ of certiorari was filed on May 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1981, petitioner was charged by complaint in the United States District Court for the Eastern District of New York with the December 26, 1980 hijacking of an armored vehicle carrying $750,000 in federally-insured bank funds, in violation of 18 U.S.C. 2113(a) and (d). At the arraignment following petitioner's arrest on March 4, 1981, the government asked the presiding federal magistrate to set bail at $500,000. The magistrate ordered bail to be set at $150,000. On the following day, the government asked the district court to increase the amount of the bail to $500,000. The district court reset bail at $350,000. The court of appeals affirmed (Pet. App. 12a-16a).

The government represented, both to the magistrate on March 4, 1981, and to the district judge on March 5, 1981, that petitioner would shortly be indicted both for the December 26, 1980 hijacking and for another armored car hijacking in which $310,000 had been stolen. In requesting that bail be set at $500,000, the government noted that petitioner presumably had access to his share of more than $1 million in cash. The government further noted both that the substantial evidence of petitioner's guilt, including the availability of several eyewitnesses, created a strong likelihood of conviction, and that petitioner faced a lengthy prison sentence if convicted. The government also stated that petitioner had no known employment, that he had close associations with organized crime, that he possessed numerous weapons including a sawed-off shotgun and an automatic weapon, and that a grand jury had heard testimony to the effect that petitioner and his associates had been involved in a number of attempted

murders by strangulation and by the use of weapons. The government pointed out that since 1972 petitioner had been arrested on a number of occasions on charges relating to stolen property and weapons, and that petitioner had been convicted for robbery and sentenced under a New York state youth offender provision in 1973. Finally, the government stated that although petitioner had represented that he lived at his parents' address, he had actually resided at two other addresses, and he had been arrested at a third address. Pet. App. 2a-5a.[1]

At the hearing before the district court, petitioner's counsel claimed that the $150,000 bail set by the magistrate was excessive. Defense counsel admitted that petitioner had been arrested several times but stated that petitioner's prior conviction was a youthful offender conviction rather than a robbery conviction. Counsel also argued that petitioner had a right to choose his associates, and counsel stated that he did not understand how petitioner could have access to $1 million. Counsel also disputed the strength of the government's case. Finally, defense counsel did not object to petitioner's absence from the hearing before the district court.[2] The district court set bail at $350,000. Pet. App. 6a-8a.

2. Petitioner appealed the district court's bail determination to the court of appeals, challenging the district court's authority to increase the amount of

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[1] The government also asserted that petitioner had access to twelve automobiles that were registered in his parents' names, but with respect to which his parents claimed no knowledge (Pet. App. 4a).

[2] Petitioner had been present, of course, at the initial hearing before the magistrate on March 4, 1981 (Pet. App. 13a).

bail set by the magistrate.[3] The court of appeals affirmed the district court's order after hearing oral argument on March 18, 1981 (Pet. App. 12a). Thereafter, on April 6, 1981, the court of appeals filed an opinion setting forth the reasons for its decision (*id.* at 12a-16a). The court of appeals found "no reason to doubt that the authority of the trial judge to amend conditions of bail can * * * be exercised, upon motion of the Government, when the conditions were previously set by some other judicial officer" (*id.* at 14a-15a). However, the court of appeals also suggested that petitioner could return to the district court for specific findings and conclusions with respect to the bail order (*id.* at 15a & n.1).

On March 19, 1981, petitioner requested, pursuant to the court of appeals' suggestion, that the district court enter findings of fact with respect to its bail ruling (Pet. App. 18a). Judge Bramwell made specific findings, adopting the facts that the government had previously set forth both orally in open court and by affidavit (*id.* at 19a-20a). Because the case had been assigned for trial before Judge Nickerson, who was unavailable on March 19, and "in light of the history of this individual and what is before the Court," Judge Bramwell determined that "the bail is going to remain" and any further application should be made to Judge Nickerson (*id.* at 20a).

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[3] On March 10, 1981, prior to oral argument in the court of appeals, an eight-count indictment was returned in the United States District Court for the Eastern District of New York, in which petitioner was charged with various violations of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 1951 arising out of the two hijackings. See Pet. App. 16a.

Thereafter, Judge Nickerson refused to modify the bail order.[4]

Petitioner's trial commenced in the district court on June 29, 1981.[5]

ARGUMENT

Petitioner contends (Pet. 9-11) that the government lacked authority to appeal the magistrate's initial bail determination to the district court. In other words, petitioner argues that the government is powerless to seek review in the district court of a magistrate's initial determination of bail, regardless of how arbitrary or erroneous that determination may be, and regardless of how likely it is that the defendant will fail to appear for trial in the district court. We note at the outset that petitioner does not contend that the decision below conflicts with any previous decision of this Court or of any other court of appeals. In any event, his contention lacks merit.

18 U.S.C. 3147(b),[6] which authorizes appellate review of the conditions of bail, implicitly authorizes

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[4] On April 6, 1981, Justice Marshall denied an application for bail pending trial (Pet. App. 21a).

[5] We note therefore that this case may well be moot at the time that the Court considers the petition for a writ of certiorari. See Petitioner's Motion To Expedite Consideration of Petition for a Writ of Certiorari ¶ 2 (May 5, 1981).

[6] 18 U.S.C. 3147(b) provides:

> In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court

the district court to review a magistrate's bail determination. As the court below pointed out (Pet. App. 14a-15a):

> Under subsection (b), appellate review is permitted under two circumstances. The first is where a court has denied a motion under subsection (a), *i.e.*, a motion made by the person detained. The second is where conditions of release have been "imposed *or amended* by a judge of the court having original jurisdiction over the offense charged." (Emphasis added). By contemplating amendment of the conditions of release by the trial judge, the statute could mean amendment only upon motion of the defendant or also upon motion of the Government. If the conditions were initially set by the trial judge, as might occur if the judge was the judicial officer before whom the accused was first presented pursuant to Fed. R. Crim. P. 5, there would be no question that amendment could be sought by the Government, since § 3146(e) explicitly authorizes the judicial officer who originally set the conditions of bail to amend his order by imposing additional conditions. We see no reason to doubt that the authority of the trial judge to amend conditions of bail can also be exercised, upon motion of the Government, when the conditions were previously set by some other judicial officer.

The court of appeals' interpretation of this provision is consistent with the well-established inherent

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having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.

power of the trial court with respect to preliminary matters arising in litigation over which it has jurisdiction. This inherent authority necessarily extends to jurisdiction over enlargements of bail. Otherwise, a trial court would be unable to take the steps that it deemed necessary to secure the defendant's presence at trial. See *United States* v. *Abrahams*, 575 F.2d 3, 6-7 (1st Cir.), cert. denied, 439 U.S. 821 (1978). Clearly, this inherent authority of the district court is not displaced simply because a preliminary bail determination has been made by a magistrate. Indeed, the Federal Magistrates Act provides that "[a] judge of the court may reconsider any [nondispositive] pretrial matter" determined by a magistrate. 28 U.S.C. 636(b)(1)(A). See also *United States* v. *Raddatz*, 447 U.S. 667 (1980); *Bruno* v. *Hamilton*, 521 F.2d 114, 116 (8th Cir. 1975).[7]

The authority of the district court to review bail terms is essential to the proper administration of the criminal justice system because the first setting of bail may be done in haste, on the basis of incomplete information, and before an indictment has actually been returned. Moreover, it is not uncommon for bail to be fixed in the first instance by

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[7] Rule 25.1 of the General Rules of the United States District Court for the Eastern District of New York states that "[a]ny party may appeal [to the district court] from a magistrate's determination" of any pretrial matter, such as bail, and a district court judge "may reconsider any matter sua sponte." But see 18 U.S.C. 3401-3402; Rule 7 of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates (designating the district court to hear government appeals from any magistrate's order that would be appealable to the court of appeals if made by a district court).

a judicial officer far removed from the district in which the case will be tried. As Justice Jackson stated in his concurring opinion in *Stack* v. *Boyle*, 342 U.S. 1, 11-12 (1951):

> The first fixing of bail * * * is a serious exercise of judicial discretion. But often it must be done in haste—the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves. Some procedure for reconsideration is a practical necessity, and the court's power over revocation or reduction is a continuing power which either party may invoke as changing circumstances may require. It is highly important that such preliminary matters as bail be disposed of with as much finality as possible in the District Court where the case is to be tried. It is close to the scene of the offense, most accessible to defendant, has opportunity to see and hear the defendant and the witnesses personally, and is likely to be best informed for sound exercise of discretion. Rarely will the original determination be disturbed, if carefully made, but if the accused moves to reduce or the Government to revoke bail, a more careful deliberation may then be made on the relevant evidence presented by the parties, and if the defendant or the Government is aggrieved by a denial of the motion an appeal may be taken on the record as it then stands.

Cf. *United States* v. *Stanley*, 469 F.2d 576, 581-582 (D.C. Cir. 1972).

Contrary to petitioner's assertion (Pet. 9-11), 18 U.S.C. 3147, which derives from the Bail Reform Act of 1966, does not limit the bail authority of the

trial court in any way that is relevant here. The purpose of the Bail Reform Act was simply to insure that "all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest." H.R. Rep. No. 1541, 89th Cong., 2d Sess. 5 (1966). In short, this statute imposes no limit on the authority of the district court to review and alter the conditions of bail in a case to be tried in the district court.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

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[8] Finally, petitioner has no cause to complain that he was present only through his attorney when the district court modified the amount of the bail. As the court below noted (Pet. App. 16a), the setting of additional conditions of bail is neither a stage of the trial nor a proceeding at which the defendant's presence is required. Moreover, petitioner's counsel made no timely objection to petitioner's absence.

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